COMMENT.

The inextricable confusion in the opinions of judges before the war as to the extent of the power to regulate commerce has given place to a rapid and bold extension of that power over the whole domain of inter-State business. But the struggle between the State power of taxation and the necessities of a national commercial system does not seem to have resulted in principles of even reasonable certainty of application. Mr. Justice Bradley *a* sums up the position of the Supreme Court by saying "Inter-State commerce cannot be taxed at all." But there is no satisfactory answer in the books to the question, "What is Inter-State commerce?" There is as yet no clear boundary line past which what was just now a subject of inter-State commerce becomes a subject of State commerce.

In *ex parte* Brown *b* there is an attempt to harmonize the opinions of the Supreme Court on this subject, and to set forth a rule which will include them all. A revenue act of North Carolina provided that "Every merchant * * * who shall buy or sell goods, wares and merchandise * * * shall pay a license tax of one-tenth of one per centum on the total amount of purchases in or out of the State—except purchases on farm products from the producer." The court decides that the tax on goods purchased without the State is constitutional even where such goods are in the original package unsold in the hands of the importer. The principle laid down in *Brown* v. *Maryland*, *c* that imported goods do not become mingled with the general property of the country until sold by the importer, is held not to apply to inter-State transactions. The substance of *Leisy* v. *Hardin* is said to be that "Any interference by seizure or by any other action in prohibition of the sale of goods by their non-resident importer was a regula-

a *Robbins* v. *Shelby Co. Taxing District*, 120 U. S. 497.
b 48 Fed. Rep. 435.
c 12 Wheaton 419.

tion of inter-State commerce, but does not decide that a tax was such an interference," and the position established by that case and *Robbins* v. *Shelby Taxing District* were said to be that in the first case "a power to sell is an adjunct of and necessarily involved in inter-State commerce;" of the last that "a non-discriminating tax on commodities brought into the State by non-residents is not a tax on inter-State commerce." The result of all the decisions and the true criterion is declared as follows: "We find that the test of constitutionality is the absence or existence of discrimination. But the mere fact that an equal tax is laid upon the commodities or business of the home and foreign state is not conclusive of absence of discrimination. Whenever the effect of a State tax upon a particular commodity is to protect the productions of the taxing State from competition with such commodity, or to evidently impose the burden of the State revenue on goods produced outside the taxing State, and to favor home productions generally, it may be well contended that it is an interference with inter-State commerce. Should a tax be imposed upon a commodity for the purpose of preventing its sale at all within the State,—for instance, should a State impose such a prohibitive tax on spirituous liquors as should stop their sale,—the case would appear to come within the mischief and reason of *Leisy* v. *Hardin*, and to be unconstitutional. A strong argument might be made against all State taxation of special objects of merchandise, on the ground that the power of taxation being in its nature unlimited, the power to tax involved also the power to prohibit; and also for the reasons urged by Nelson, J., in the dissenting opinion in *Woodruff* v. *Parham*, *d* that such taxation involved generally the power to discriminate in favor of home manufactures. But no argument of that kind applies to the case of the application for a writ of *habeas corpus* now under consideration. In no manner can a general tax upon all merchandise, which this tax in effect is, be made discriminating. Such taxation cannot be used to favor the manufacture of particular articles, or of home articles in general, or to in any way check the business of the purchase and sale of goods brought from other States excepting in the degree that all taxation checks trade." The court does not discuss the discrimination made in the act between the purchaser of farm products from the producer without the State and the purchaser from the wholesale merchants, but says, "I do not regard the single exception in the statute as material."

d 8 Wall 123.

There is a seeming conflict of authority between two decisions recently rendered, one in Pennsylvania, *Commonwealth* v. *Northern Electric Light and Power Co.*, 22 Atl. Rep. 839, and the other in New York, *Brush Electric Co.* v. *Wemple, Comptroller*, not yet reported, the former court holding that electric light companies are not, and the latter, that they are manufacturing companies within the meaning of statutory provisions exempting such companies from certain taxation. The reason for this difference, however, is found in the statutes themselves which have been enacted in the two States designating the kinds of companies which are entitled to the exemption. In the absence of such statutes, both courts agree that electric light companies should be considered as manufacturing companies in the ordinary meaning of the term and as it is defined in lexicons and books of reference; the generally adopted definition including any company employing capital, skilled labor and machinery, in the production of some article, thing or object out of raw material or material already acted upon. Therefore, it is said, since the business of an electric company requires the investment of capital in an expensive plant, the consumption of coal in vast quantities,—or the concentration of an equal amount of power by other means,—and the employment of skilled labor in the manipulation of complicated machinery, the product being distributed through a system of cables, mains and wires; and by the use of ingenious mechanical contrivances, which accumulate, measure, and liberate it at will, a mysterious effect is produced which is apparent in the new light; it is evident that this is practically a manufacturing operation. It is in every essential feature a repetition of the process described in the definition. It is not an appropriation from nature, to be regarded in the same light as the liberation of natural gas or oil from the earth, or the collection and transportation of ice for customers. Rather it is analogous to the production of illuminating gas or artificial ice, and companies organized for either of these purposes are manufacturing companies. *Nassau Gas Light Co.* v. *Brooklyn*, 89 N. Y. 409; *People* v. *Knickerbocker Ice Co.*, 99 N. Y. 101. Nor does it make any difference whether the product is a material substance or a form of energy. Such a discussion would involve not only difficult but unimportant questions. The ordinary use of words of such universal application does not imply any such refined distinction. It is sufficient that a new and useful property, otherwise unavailable, has been discovered, and by a wholly artificial process applied in various useful ways, to the ordinary business of mankind.

The case of *Hermes* v. *Chicago & N. W. R'y. Co.*, 50 N. W. Rep. 584 (Wisconsin), presents an interesting question involving the doctrine of *res gestæ*, and which has a marked tendency to extend its application in cases where declarations of agents are admissible as against principals because they constitute part of the *res gestæ*.

This was an action brought by the plaintiff against the defendant company for the death of a child caused by the alleged negligence of defendant's servants. Upon the trial below plaintiff offered in evidence proof of certain statements made by the engineer a few minutes after the accident and explanatory of its cause, the Court admitting the evidence. Upon an appeal from this ruling of the court, Chas. J. Cole delivering the opinion, held the statements admissible as being part of the *res gestæ*, interpreting the doctrine to be "that the *res gestæ* mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character." The effect of a tendency of decisions in this direction will be to render it more difficult to distinguish as to what is and what is not a mere narration of a completed act, and moreover to discern when the mind of the person ceases to act under the impulse and as effect of the act itself and when it has begun to act under the dictation or direction of some independent cause or in pursuance of some extraneous circumstance.

This case is a clear departure from the rule as laid down by the U. S. Supreme Court in *Vicksburg R. R. Co.* v. *O'Brien*, 119 U. S. 99, and also by the N. Y. Court of Appeals in *Luby* v. *Hudson River Railroad*, 17 N. Y. 131. In the former case the court held that the statements made by an engineer within "ten or twenty minutes after the accident, were not part of the *res gestæ* and hence not admissible." Chief Justice Harlan in the course of his opinion, said, "such statements are not to be deemed part of the *res gestæ* simply because of the brief period intervening between the accident and the making of the declarations;" continuing, he says, "the fact remains that the occurrence had ended when the declaration in question had been made and the engineer was not in the act of doing anything that could possibly affect it."

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The law does not always afford that degree of protection to dogs that individuals, who own and care for valuable animals, would desire. In a recent Mississippi case it was decided that a dog running at large could be lawfully killed by a police officer,

even though it was usually kept at home, had accidentally escaped, and was being pursued by the owner's wife; that it was entirely within the legislative power to authorize such summary proceedings, and they were free from the constitutional objection that private property should not be taken or destroyed without due process of law; *Julienne* v. *City of Jackson*, 10 South. Rep. 43. In Massachusetts it has been held that a dog not licensed and collared according to the provisions of law, may be shot within the owner's close by any officer. *Blair* v. *Forehand*, 100 Mass. 136. In New Hampshire it is provided by statute that any person can kill a dog not having a collar around its neck with the owner's name engraved thereon, or having a collar with only the initials of the owner's name, even if he knows the owner. See also *Morey* v. *Brown*, 42 N. H. 373.

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The Supreme Court of Illinois has recently decided in the case of *Cerveny* v. *Chicago News Co.*, 28 N. E. Rep. 692, that it is libellous to falsely publish of a person that he is an anarchist. The decision is interesting inasmuch as this exact question was never before presented to a court for consideration, and the reasoning of the court would seem to be that such publication was libellous *per se*, for no special damages were alleged. Anarchist is defined by Webster to be: "An anarch; one who incites revolt or promotes disorder in a state." To accuse another of being an anarchist is therefore more than charging him with being a member of a political organization, the object of all political parties being to maintain government, not to destroy it. To falsely publish such a charge must as inevitably bring one into public hatred, contempt and ridicule as to charge him with being a thief, though special damage might be as hard to prove in the one case as in the other.

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The Supreme Court of Iowa, in the case of *Lindley* v. *Polk County*, 50 N. W. Rep. 975, decided that a prisoner who was confined in the county jail upon an indictment for forgery, could not recover from the county for injuries to his health caused by the negligence of the county board of supervisors to keep the jail in a healthy condition.